

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SANDRA B.,

Plaintiff,
v. Civil Action No.
3:23-cv-580 (DEP)

MARTIN J. O'MALLEY,
Commissioner of Social Security
Administration,¹

Defendant.

APPEARANCES:

FOR PLAINTIFF

LEGAL AID SOCIETY
OF MID-NEW YORK, INC.
221 South Warren Street, Suite 310
Syracuse, NY 13202

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
OFFICE OF GENERAL COUNSEL
6401 Security Boulevard
Baltimore, MD 21235

OF COUNSEL:

CINDY DOMINGUE-HENDRICKSON, ESQ.

VERNON NORWOOD, ESQ.

¹ Plaintiff's complaint named Kilolo Kijakazi, in her official capacity as the Acting Commissioner of Social Security, as the defendant. On December 20, 2023, Martin J. O'Malley took office as the Commissioner of Social Security. He has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.² Oral argument was heard in connection with those motions on May 23, 2024, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, which has been transcribed, is attached to this order, and is

² This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Defendant's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.
- 3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.



David E. Peebles
David E. Peebles
U.S. Magistrate Judge

Dated: May 29, 2024
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
SANDRA B.,

Plaintiff,

vs.

5:23-CV-580

MARTIN J. O'MALLEY,
Commissioner of Social Security,

Defendant.

-----x
Transcript of a **Decision** held during a
Telephone Conference on May 23, 2024, the
HONORABLE DAVID E. PEEBLES, United States
Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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(The Court and Counsel present by telephone.)

2 THE COURT: Thank you. Let me begin first of all
3 by thanking both counsel for excellent presentations in both
4 writing and orally today. And Attorney Hendrickson, I
5 commend you, you did not write the brief in this case, you
6 withstood my questioning in fine fashion, and so my hat is
7 off to you. Attorney Norwood always does a good job and I
8 commend him as well.

9 Before we get to the meat of my decision there is
10 one issue that I must address. When this case was initially
11 filed, it was assigned to one of my colleague magistrate
12 judges, Judge Miro Lovric. The consent form that was filed
13 and signed by Attorney Elizabeth Lombardi on behalf of
14 plaintiff on May 12, 2023 consented specifically to Judge
15 Lovric. The matter has since been reassigned to me. I'm
16 sorry to put you on the spot, Attorney Hendrickson, but do
17 you consent to my deciding this case as opposed to issuing a
18 report and recommendation to a district judge yet to be
19 named?

20 MS. HENDRICKSON: Yes, I do, your Honor.

21 THE COURT: Thank you.

22 The plaintiff has commenced this proceeding to
23 challenge an adverse determination by the Commissioner of
24 Social Security finding that she was not disabled at the
25 relevant times and therefore ineligible for the benefits

1 sought. The matter is brought pursuant to 42 United States
2 Code Section 405(g) and 1383(c) (3).

3 The background is as follows: Plaintiff was born
4 in July of 1974, she is currently 49 years of age. Plaintiff
5 lives alone in an apartment. It's a first floor apartment in
6 Oxford, New York. She is 5 foot 8 inches in height and at
7 various times has weighed approximately 180 pounds.
8 Plaintiff does not have a driver's license although she did
9 at one time drive. The evidence is somewhat equivocal as to
10 whether she is capable of taking public transportation. At
11 the hearing she said no at page 44; in her function report
12 she said yes, that's at page 400. Plaintiff has a high
13 school diploma and attended regular classes while in school.
14 Plaintiff stopped working in August of 2013. The record is
15 equivocal and unclear as to whether it was due to her
16 impairments or to domestic violence issues. While working,
17 she worked as a shipping and receiving clerk in a factory, an
18 administrative assistant, an assistant convenience store
19 manager, and an office worker.

20 Physically, plaintiff suffers from degenerative
21 disc disease of the cervical spine, degenerative joint
22 disease, bilateral, of shoulders, degenerative disc
23 disease -- I'm sorry, degenerative joint disease of the right
24 knee, obesity, and left foot pain. With regard to the foot,
25 she underwent fusion surgery on her left foot in December of

1 2019. She also has a history of bilateral shoulder issues
2 and has undergone four surgeries on her shoulder in the past,
3 bilateral knee pain, carpal tunnel syndrome, lumbar pain, and
4 has undergone, as I said, multiple surgeries.

5 Mentally, plaintiff suffers from conditions that
6 have been variously diagnosed, including as adjustment
7 disorder with anxiety, adjustment disorder with depressed
8 mood, personality disorder, opioid use disorder, stimulant
9 use disorder, methamphetamine use disorder, tobacco use
10 disorder, substance abuse in early remission. There is also
11 mention at some point of post-traumatic stress disorder and
12 bipolar disorder. Plaintiff apparently has had substance
13 abuse issues but claims to have been sober since March of
14 2019.

15 In terms of activities of daily living, plaintiff
16 is able to shower, dress, shop, do light meal preparation,
17 some laundry with the help of her daughter, she watches
18 television, listens to the radio, exercises, vacuums, can
19 walk up stairs, washes dishes, does yard work, and as I said,
20 she did drive and when she did drive, she drove her children
21 to and from school.

22 Procedurally, plaintiff applied for benefits
23 previously on May 1, 2014, that was denied on September 22,
24 2016, and the Social Security Administration Appeals Council
25 denied her application for review of that determination on

1 October 4, 2017. Another application was filed on
2 November 23, 2017 and denied on June 24, 2019. Plaintiff
3 protectively filed for Title II and Title XVI benefits on
4 July 26, 2019, alleging an onset date of August 25, 2013.
5 She claims to have been disabled based upon degenerative
6 disease of the right shoulder, meniscus tear, abnormal foot
7 growth, foot bone growth, arthritis of the neck, hands,
8 shoulder, foot, back, et cetera, torn rotator cuff, carpal
9 tunnel syndrome, post-traumatic stress disorder, depression,
10 and anxiety. A hearing was conducted on July 13, 2021 by
11 Administrative Law Judge Elizabeth Koennecke to address
12 plaintiff's applications for benefits. Another hearing was
13 conducted on October 6, 2021 at which time the testimony of a
14 vocational expert was elicited. ALJ Koennecke issued an
15 unfavorable decision on October 15, 2021. The Social
16 Security Administration Appeals Council denied plaintiff's
17 application for review of that decision on March 13, 2023.
18 This action was commenced on May 12, 2023 and is timely.

19 In her decision ALJ Koennecke initially denied any
20 explicit or implicit request by plaintiff to reopen the prior
21 proceedings, and therefore determined that the relevant
22 period for Title XVI benefits would be from June 25, 2019.
23 She also noted that plaintiff's last insured status was
24 December 31, 2018.

25 The ALJ applied the familiar five-step sequential

1 test for determining disability.

2 At step one she found that plaintiff had not
3 engaged in substantial gainful activity since August 25,
4 2013.

5 At step two she found that plaintiff does suffer
6 from severe impairments that impose more than minimal
7 limitations on her ability to perform basic work functions,
8 including mild degenerative disc disease of the cervical
9 spine, degenerative joint disease of the shoulders, and
10 degenerative joint disease of the right knee. In arriving at
11 that finding, she noted other alleged impairments -- those
12 include a history of bone spurs in her left foot, carpal
13 tunnel syndrome, her low back pain complaints, obesity, and
14 her mental conditions as variously diagnosed -- and concluded
15 that they did not constitute severe impairments as plaintiff
16 argues. At step two ALJ Koennecke did not specifically
17 address plaintiff's left knee condition. She also addressed
18 plaintiff's heart condition which she found to be mild, and
19 in that regard, found the opinion of plaintiff's cardiologist
20 to be persuasive.

21 At step three, ALJ Koennecke found the plaintiff's
22 conditions do not meet or medically equal any of the listed
23 presumptively disabling conditions set forth in the
24 Commissioner's regulations, specifically considering Listings
25 1.15 and 1.17. She then determined that notwithstanding her

1 impairments, plaintiff retains the residual functional
2 capacity, or RFC, to perform light work as defined in the
3 regulations except she can occasionally climb ramps or
4 stairs, ladders, ropes, or scaffolds and can occasionally
5 balance, stoop, kneel, crouch, or crawl. She can
6 occasionally lift or reach overhead but has no other reaching
7 limitations.

8 Applying that RFC at step four, ALJ Koennecke
9 concluded that plaintiff is incapable of performing her past
10 relevant work and proceeded to step five where, with the
11 benefit of testimony from the vocational expert, she
12 concluded that plaintiff is capable of performing available
13 work in the national economy, citing as representative
14 positions those of cashier II, sales attendant, and
15 housekeeping cleaner.

16 As you know, the court's function in this case is
17 to determine whether correct legal principles were applied
18 and the resulting determination is supported by substantial
19 evidence, defined as such relevant evidence as a reasonable
20 mind would find sufficient to support a conclusion. The
21 standard which the court must apply is extremely deferential,
22 as the Second Circuit has noted in *Brault v. Social Security*
23 *Administration Commissioner*, 683 F.3d 443, from 2012, and
24 more recently reiterated in *Schillo v. Kijakazi*, 31 F.4th 64
25 from 2022. As the Second Circuit noted in *Brault*, what the

1 standard means is that once an ALJ makes a finding of fact,
2 that fact can be rejected only if no reasonable person would
3 have to reach that conclusion. As I said before, it's a
4 deferential standard, more rigorous than the clearly
5 erroneous standard. The exact quote is, "The substantial
6 evidence standard means once an ALJ finds facts, we can
7 reject those facts only if a reasonable fact finder would
8 have to conclude otherwise." It also should be noted that it
9 is plaintiff's burden through step four, including at the RFC
10 level, to demonstrate her impairments and the resulting
11 limitations that would affect her ability to perform basic
12 work functions. The Commissioner of course bears the burden
13 at step five.

14 Plaintiff's contentions in this case can be more or
15 less boiled down, she complains of the failure to find
16 plaintiff's left knee as a medically determinable impairment,
17 and of the fact that several other of her conditions were not
18 found to be severe, including degenerative disc disease,
19 borderline personality disorder, and obesity.

20 Secondly, she challenges the evaluation of medical
21 opinions pursuant to the revised regulations that took effect
22 in 2017, including the opinions of Dr. Ewald, plaintiff's
23 podiatrist, various check-box forms that were lumped together
24 by ALJ Koennecke and discussed collectively, the opinion of
25 Dr. Gilbert Jenouri, a consulting examiner, and Dr. Abueg and

1 Dr. Kirsch, state agency consultants.

2 With regard to plaintiff's left knee impairment, at
3 step two of the sequential evaluation, a claimant must show
4 that he or she has a medically determinable impairment that
5 rises to the level of a severe impairment, 20 C.F.R. Section
6 404.1520(a)(4)(ii) and 416.920(a)(4)(ii). An impairment
7 fails to reach this threshold of severity where it does not
8 significantly limit your physical or mental ability to
9 perform basic work activities, which include the ability to
10 engage in exertional functions, to see, hear, speak,
11 understand, remember, and carry out simple instructions, use
12 judgment, respond appropriately to supervision, coworkers and
13 usual work situations, and deal with changes in a routine
14 work setting. Undeniably, as plaintiff has argued, the step
15 two test is fairly de minimus and intended only to screen out
16 the truly weakest of cases. The mere presence of an
17 impairment or disease, however, is not sufficient by itself
18 to render a condition severe.

19 The -- in terms of the left knee, I note that it
20 was not addressed clearly at step two in ALJ Koennecke's
21 discussion, and therefore one must assume it was not found to
22 be a medically determinable impairment which is defined as an
23 impairment resulting from anatomical, physiological or a
24 physical and mental -- or psychological abnormalities that
25 can be shown by medically acceptable clinical and laboratory

1 diagnostic techniques. The regulation provides that a
2 physical or mental impairment must be established by
3 objective medical evidence from an acceptable medical source,
4 20 C.F.R. Section 404.1521. Clearly plaintiff has complained
5 of bilateral knee pain. She made complaints in 2018 and
6 2019, including at 624, 631 to 632 and 2066, and in 2020 she
7 complained that her pain in the left knee was worse, surgery
8 was discussed. As the plaintiff points out, in July of 2020,
9 there was magnetic resonance imaging, or MRI, testing, the
10 results are at 2066 and 2070, they are signed by a physician,
11 Dr. Timothy Shepard. Dr. Gilbert Jenouri, the consultative
12 examiner, diagnosed the plaintiff with bilateral knee pain,
13 that's at page 755.

14 So it appears that it was error to find that it was
15 not a medical determinable impairment or even to mention it.
16 And that of course is problematic. As plaintiff has argued,
17 it is not harmless error necessarily, *Penny Lou S. v.*
18 *Commissioner of Social Security*, 2019 WL 5078603. In that
19 case, Magistrate Judge Conroy from the District of Vermont in
20 October of 2019 pointed out that a finding of a condition not
21 being a medically determinable impairment can color the
22 subsequent sequential analysis. In this case, the ALJ said
23 she has considered all medically determinable impairments,
24 severe and nonsevere, in assessing the RFC at page 18, so she
25 obviously did not consider plaintiff's left knee condition

1 which she found not to be a medically determinable
2 impairment.

3 The matter was raised in *Lorraine Michelle H. v.*
4 *Commissioner of Social Security*, 2022 WL 7285345 from the
5 Northern District of New York, Magistrate Judge Thérèse Wiley
6 Dancks, September 13th, 2022. In that case she went on to
7 say that while migraine headaches were not found to be a
8 medically determinable impairment, they clearly were
9 considered throughout the course of the decision. Do I still
10 have both counsel on the line?

11 MR. NORWOOD: Yes, your Honor.

12 MS. HENDRICKSON: Yes.

13 THE COURT: Okay, I heard a ding and I wasn't sure
14 what it meant.

15 So clearly, that is potentially problematic, that
16 it was not found to be -- I'll call it an MDI. However, I
17 didn't find, and I scoured the medical opinions and the
18 medical evidence, did not find any evidence of resulting
19 limitations on the ability to perform plaintiff's basic work
20 activities beyond those already reflected in the RFC.

21 On September 26, 2019, Dr. Jenouri found
22 plaintiff's gait to be normal and found no limitations in
23 walking, just a moderate limitation in standing long periods.
24 That's at 755.

25 On October 1, 2013, Physician's Assistant Michelle

1 Provost found no limitation in standing and walking, that's
2 at 1960.

3 On November 16, 2015, Dr. Matthew Cline, if I'm
4 reading my notes correctly, found only a moderate limitation
5 in walking and standing, that's at 1964, but that was in
6 anticipation of foot surgery which was to take effect -- or
7 to occur on November 26, 2015. And there was an indication
8 that the condition would last one to three months and then
9 plaintiff could resume normal activities.

10 In May of 2016, Dr. Kamlesh Desai, an orthopedist,
11 found no limitation in walking and standing, that's at 1965
12 to 66. Family Nurse Practitioner Maria Berry found no
13 limitation in walking and standing in October of 2017, that's
14 at 1970.

15 On October 28, 2018, Nurse Practitioner Berry found
16 no limitation in walking, 1974. She did note, however, that
17 plaintiff cannot walk or stand for extended time.

18 Dr. Michael McClure on July 29, 2019 indicated
19 plaintiff presents for bilateral pain, worsened right knee,
20 x-ray unremarkable for left, that's at 813. Gait normal,
21 full strength and range of motion in legs, that's at 810 to
22 813.

23 Dr. Abueg and Dr. Kirsch, the two state agency
24 physicians that were consulted, supported the RFC. Both
25 indicated plaintiff can stand and/or walk for six hours in an

1 eight-hour day. They noted only the back -- well, they noted
2 there was no medically determinable impairment as of
3 plaintiff's last date of insured status at 132 to 138, and
4 only a severe medically determinable impairment of the back
5 thereafter.

6 Nurse Practitioner Berry on December 27, 2019 found
7 that plaintiff had only moderate limitations in the ability
8 to walk and stand, that's at 1975 to 1976, which is not
9 inconsistent with light work, I will add.

10 So I don't find -- although this is a close case,
11 and I agree that *Penny Lou S.* makes the harmless error
12 doctrine potentially inapplicable in a case like this, it's
13 clear that the ALJ was obviously aware of plaintiff's left
14 knee pain, that's indicated at page 22. I didn't find any
15 evidence that the left knee impairment would undermine the
16 RFC, and so while there may have been error, it would be, it
17 would be an exercise in futility in my view to remand this
18 matter and recognize left knee pain as a medically
19 determinable impairment. It would not change the outcome.
20 And I'll note in that regard, in fairness to ALJ Koennecke,
21 plaintiff did not claim in her function report a left knee
22 issue as a basis for finding disability, that's at page 371.

23 Turning to the argument of not finding severe
24 impairments for those that were determined to be medically
25 determinable, with respect to the mental borderline

1 personality disorder, the ALJ clearly considered plaintiff's
2 mental impairments, they were discussed at 17 to 19 of the
3 Administrative Transcript, including borderline personality
4 disorder. She applied the special technique and found mild
5 limitations in two of the four part B domains and no
6 limitations in the other two. Her determination is supported
7 by the consultative report of Dr. Sara Long who examined the
8 plaintiff. It was not diagnosed by her at page 749. It's
9 also supported by Dr. J. Weitzen at 1959 and Dr. Kamin, 1017.
10 And I'll note that it is clear that state agency consultants
11 can provide -- can supply substantial evidence to support a
12 determination if they are supported in turn by substantial
13 evidence. *Woytowicz v. Commissioner of Social Security*, 2016
14 WL 6427787, from the Northern District of New York,
15 October 5, 2016, report and recommendation of Magistrate
16 Judge William Carter, was later adopted by Judge Glenn
17 Suddaby on October 28, 2016 at 2016 WL 6426385. I will take
18 pause to note that it is true that in a, particularly in a
19 mental health case, the opinions of nonexamining consultants
20 are given a little bit less weight than someone who has
21 treated or examined the plaintiff. In this case, because it
22 is consistent with Dr. Long who examined the plaintiff and
23 also several of her treating therapists, however, I believe
24 that it is appropriate to weigh those state agency
25 consultative reports and give them credibility or credence.

1 I note that plaintiff's therapists do not opine to
2 more significant limitations, and plaintiff's activities of
3 daily living and her own function report do not contradict
4 the state agency consultants' findings. So I find no error.
5 And again, if there was error, it was harmless because ALJ
6 Koennecke specifically stated she was considering all
7 impairments when formulating the RFC, both severe and
8 nonsevere. And so because she went on to the rest of the
9 sequential analysis, there was -- if there was error, it was
10 harmless. But I don't believe there was error.

11 With regard to bone spurs, ALJ Koennecke at page 17
12 explained why she rejected that as a severe impairment. She
13 cited evidence which showed that after the December 2019
14 surgery, within six months plaintiff returned to normal. I
15 do agree the decision could have been clearer as to the basis
16 and specifically whether or not her condition met the
17 durational requirement but if there was error, again, it was
18 harmless based on the assertion that ALJ Koennecke considered
19 all of plaintiff's medically determinable impairments.

20 Obesity was addressed at page 17 of the decision.
21 It was explained that there wasn't any evidence presented by
22 the plaintiff to show that her obesity imposed more
23 limitations than those resulting from her other impairments.
24 It is plaintiff's burden to show resulting limitations. The
25 mere existence of a condition like obesity alone will not

1 suffice. Again, if it was error, it was harmless based on
2 the statement that the ALJ considered the effects of obesity
3 in formulating her RFC at page 17.

4 Lumbar spine, the objective evidence, both MRI
5 testing results and x-rays, were largely unremarkable. The
6 MRI in September of 2019 showed only a small disc protrusion
7 at L5-S1 and a moderate protrusion at L4-L5. Once again, if
8 there was error, it was harmless.

9 Pivotal, as you know, to the determination of
10 disability is assessment of the plaintiff's residual
11 functional capacity or RFC, which is a finding of the range
12 of tasks he or she is capable of performing notwithstanding
13 his or her impairments. An RFC ordinarily represents a
14 claimant's ability, maximum ability to perform sustained work
15 activities in an ordinary setting on a regular and continuing
16 basis, meaning eight hours a day for five days a week or an
17 equivalent schedule. And of course an RFC is informed by
18 consideration of all of the evidence of record and must be
19 supported by substantial evidence.

20 In this case, the RFC includes the ability to
21 perform light work, which is defined by regulation in 20
22 C.F.R. Section 404.1527, and also Social Security Ruling
23 83-10. Essentially when it comes to standing or walking,
24 which seems to be the primary focus of plaintiff's arguments,
25 it requires the ability to intermittently stand or walk for a

1 total of six hours in an eight-hour workday. *Poupore v.*
2 *Astrue*, 566 F.3d 303, Second Circuit 2009, and also *Lisa B.*
3 *v. Commissioner of Social Security*, 2022 WL 6735016, Northern
4 District of New York, October 11, 2022.

5 In this case the RFC is supported by the opinions
6 of Dr. Abueg, Dr. Kirsch, and Dr. Jenouri. I note that
7 Dr. Jenouri did find moderate limitation, however, case law
8 is clear -- that he found moderate limitation in standing
9 long periods, that's at 755. Case law is clear, however,
10 that moderate limitations in the ability to stand, sit, and
11 perform other activities is not inconsistent with light work.
12 *White v. Berryhill*, 753 F.App'x 80 from the Second Circuit,
13 February 7, 2019.

14 So I believe the RFC is supported, including by the
15 many medical opinions in the record, which leads me to
16 evaluation of those medical opinions. And there are many,
17 many in the record. Frankly, there's something for everyone
18 in the medical opinions, but the vast majority of them
19 actually support the RFC, and that includes from treating
20 sources. Those opinions are in varying degrees of
21 specificity. When it comes to evaluation of medical
22 opinions, under the new regulations, applicable to
23 applications filed after March 27, 2017, the Commissioner no
24 longer defers or gives any specific evidentiary weight,
25 including controlling weight, to medical opinions, but rather

1 will consider those opinions and whether they are persuasive
2 by primarily considering whether they are supported by and
3 consistent with the record in the case. 20 C.F.R. Section
4 404.1520(c) and 20 C.F.R. Section 416.920c. The ALJ must
5 articulate in his or her determination as to how persuasive
6 he or she finds all of the medical opinions and explain how
7 he or she considered supportability and consistency of those
8 opinions.

9 Plaintiff first complains of the treatment of,
10 and -- first complains of the treatment of opinions, or I
11 should say notes provided by Dr. Brandon Ewald, plaintiff's
12 treating podiatrist. On December 27, 2019, Dr. Ewald
13 performed surgery on the plaintiff and filed a report that is
14 located at 1740 to 1742 of the Administrative Transcript. In
15 that report, he states the following: "Stable to home,
16 non-weight bearing and posterior splint, leave bandage clean,
17 dry and intact until first postoperative visit." On
18 January 8, 2020, he provides a statement of employability in
19 which he concludes that plaintiff is very limited in walking
20 and standing. That's at page 1979 and 1980. On January 23,
21 2020, at page 1827, he provides a note addressed to "To Whom
22 It May Concern," stating simply, "I will ask that she," the
23 plaintiff, "be out of work 1/24/20."

24 On -- so of those, the only one that constitutes a
25 medical opinion, which is defined in the regulations as a

1 statement from a medical source about what you can still do
2 despite your impairments and whether you have one or more
3 impairment-related limitations or restrictions in various
4 specified abilities, including meeting the physical demands
5 of work activities, 20 C.F.R. Section 404.1513, the only one
6 of those three that constitutes an opinion, a medical opinion
7 is the January 8, 2020 opinion. The administrative law judge
8 discussed it and found it less persuasive, because in her
9 view, the evidence, including Dr. Ewald's notes, suggested
10 that the condition was temporary and was related to the
11 surgery that's at page 23. As confirmed by statements on
12 March 13, 2020, that's 2005, 2008, and June 5, 2020, that's
13 at 2009 to 2012, indicating plaintiff was pleased with the
14 results of the surgery and resumed normal activities. Read
15 as a whole, I am unable to say that the ALJ did not properly
16 consider consistency and supportability of Dr. Ewald's
17 opinions.

18 Next, plaintiff raises issues concerning the
19 various check-box forms. There were many. The salient ones
20 that I found include from Physician's Assistant Michelle
21 Provost, October 1, 1959, 1960, who found no
22 limitations in plaintiff's ability to walk and stand;
23 Physical Therapist Daniel Downs, it is undated, appears at
24 1961 to 1962, there were no limitations physically noted;
25 Licensed Master Social Worker Vincent Nucero from

1 November 13, 2017, that appears at 1971 to 1972, finding
2 moderate limitation in four mental areas; Dr. Kamlesh Desai,
3 an orthopedist, from May 3, 2016, that's at 1965 to 1966,
4 finding no limitation in plaintiff's ability to walk and
5 stand; Dr. Matthew Cline from November 16, 2015, 1963 to
6 1964, finding moderate limitations in the ability to walk and
7 stand but noted that after her procedure she would likely be
8 able to return to full activity, the procedure being the
9 November 26, 2015 anticipated surgery. There are also
10 several from Nurse Practitioner Berry. One from October 7,
11 2017, 1969, 1970 with no limitations noted to walk and stand;
12 October 28, 2018, 1973 to 1974, no limitations in walking but
13 cannot stand or walk for any extended time; and December 27,
14 2019, that's at 1975, 1976, moderate limitation in walking
15 and standing, cannot stand for any length of time. The only
16 one that was addressed by the ALJ was the December 27, 2019
17 opinion, that's at page 23. These were grouped together and
18 summarily discounted as being in check-box forms, that's at
19 page 23, because they were based solely on plaintiff's
20 subjective complaints and inconsistent with the record.

21 I recognize fully that the Second Circuit has said
22 that the fact alone that a form is provided by a treatment
23 provider or someone else on a check-box form without any
24 citation to supporting evidence alone is not a sufficient
25 basis to reject check-box forms, *Colgan v. Kijakazi*, 22 F.3d

1 353 from January 22, 2022. However, A, these are not very
2 useful because most of them don't have any treating
3 relationship with the -- or I'm sorry, don't have extended
4 treatment notes in the record that the ALJ could look to to
5 determine whether those check-box forms are supported by
6 findings or not. However, I don't find that any of them are
7 inconsistent with the RFC finding. So if there was error, it
8 was harmless.

9 Dr. Gilbert Jenouri gave an opinion, he was a
10 consultative examiner, that was discussed, that was -- the
11 report was issued on September 26, 2019 at page 752 to 757.
12 It, as I indicated previously, suggested only a moderate
13 limitation or restriction in standing long periods. It was
14 addressed by the administrative law judge at page 23 and
15 found to be less persuasive. I'm not sure it's totally
16 inconsistent with the RFC but in any event, I don't find any
17 error in her assessment of Dr. Jenouri's opinion when the
18 decision is read as a whole.

19 The state agency consultants who opined concerning
20 physical abilities of the plaintiff, Dr. Abueg on October 10,
21 2019, 132 to 137, and that was for the period predating, or
22 as of December 31, 2018, the date of last insured status, he
23 found no medically determinable impairments. He also issued
24 an opinion on October 10, 2019, that's at 119 to 131, that
25 supports the residual functional capacity. Dr. Kirsch on

1 February 7, 2020, on reconsideration, found that as of
2 12/31/18 there was no medically determinable impairment, 158
3 to 173. He issued another opinion on February 7, 2020, 141
4 to 157, supporting the RFC. They were both addressed at
5 page 23 by the ALJ and found to be more persuasive.

6 As I indicated previously, it is proper for an ALJ
7 to rely on the opinions of a state agency consultant.
8 Plaintiff argues that those may have been stale; however, I
9 didn't see any evidence of a significant deterioration of
10 plaintiff's physical condition after those opinions were
11 rendered that would have undermined their ability to serve as
12 substantial evidence to support the RFC.

13 So in summary, it's clear that this decision could
14 have been written better, there are certain aspects of it
15 that are potentially problematic, but my conclusion is in
16 most instances, if there was error, it was harmless error,
17 and I am unable to say that no reasonable fact finder -- I'm
18 sorry, put another way, a reasonable fact finder would have
19 to conclude other than the way in which the administrative
20 law judge did. I think when her decision is read as a whole,
21 the court can glean why she weighed the medical opinions of
22 record the way she did, and it seems to me that the plaintiff
23 is simply asking the court to weigh them differently --
24 something which is clearly not the court's function. So I
25 will grant judgment on the pleadings to the defendant and

1 order dismissal of plaintiff's complaint and the entry of
2 judgment to that effect.

3 Thank you again for excellent presentations, I hope
4 you have a wonderful Memorial Day weekend. Thank you.

5 MS. HENDRICKSON: Thank you, your Honor.

6 MR. NORWOOD: Thank you.

7 (Proceedings Adjourned, 3:20 p.m.)

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1 CERTIFICATE OF OFFICIAL REPORTER
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4 I, JODI L. HIBBARD, RMR, CRR, CSR, Federal
5 Official Realtime Court Reporter, in and for the
6 United States District Court for the Northern
7 District of New York, DO HEREBY CERTIFY that
8 pursuant to Section 753, Title 28, United States
9 Code, that the foregoing is a true and correct
10 transcript of the stenographically reported
11 proceedings held in the above-entitled matter and
12 that the transcript page format is in conformance
13 with the regulations of the Judicial Conference of
14 the United States.

15

16 Dated this 28th day of May, 2024.

17

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19 /S/ JODI L. HIBBARD

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JODI L. HIBBARD, RMR, CRR, CSR
21 Official U.S. Court Reporter

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